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No. 90-79

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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RICHARD B. KAY,

*Petitioner,*

v.

BREMER EHRLER AND THE KENTUCKY BOARD OF ELECTIONS,

*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

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### I. THE LANGUAGE OF SECTION 1988 AUTHORIZES FEE AWARDS TO PRO SE ATTORNEYS

Section 1988 authorizes a reasonable "attorney's" fee to prevailing parties in civil rights cases. Respondents and their amici argue that petitioner falls outside the language of Section 1988 because, even though he is a "lawyer," he is not an "attorney" when he appears pro se (Resp. Br. 13; U.S. Br. 15; Hawaii Br. 4). According to respondents and amici, the concept of "attorney" involves, in addition to legal training, an agency relationship with a client; consequently, they argue, " 'the

terms 'pro se' and 'attorney' are mutually exclusive'" (U.S. Br. 15 (quoting authority)). This Talmudic distinction between "lawyer" and "attorney" is without merit and should be rejected.

In support of their position, respondents and amici rely on various dictionary definitions of attorney as one who is appointed to act for another, and cite the agency usage in such terms as "power of attorney" and "attorney in fact" (*see* Resp. Br. 12-13; U.S. Br. 14-15 & n.8; Hawaii Br. 4). In fact, however, this is *not* the common usage of the term. As Black's Law Dictionary notes, after referring to the historical usage of "attorney" to describe an agency relationship:

> *In its most common usage* . . . unless a contrary meaning is clearly intended, this term [attorney] means "attorney at law," "lawyer" or "counselor at law."

Black's Law Dictionary 128 (6th ed. 1990) (emphasis added). Even respondents concede that the term "attorney" is "most commonly us[ed]" to refer to a person licensed to practice law" (Resp. Br. 11). And both the court of appeals (Pet. App. 3a) and the magistrate (Pet. App. 27a), whose views were adopted by the district court (Pet. App. 16a), expressly recognized petitioner as a "licensed attorney." [1]

[1] Although respondents assert that the terms "pro se" and "attorney's fees" are "mutually exclusive" (Resp. Br. 13), courts frequently use the term "attorney" in the context of pro se representation. *See, e.g., Falcone v. IRS*, 466 U.S. 908 (1984) (White, J., dissenting from denial of cert.) ("pro se attorney plaintiffs"); *Poythress v. Kessler*, 475 U.S. 1129 (1986) (Burger, C.J., dissenting from denial of cert.) ("a *pro se* plaintiff who is also an attorney"); *Cheung v. Youth Orchestra Foundation of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990) ("*pro se* attorney"); *Prince v. Poulos*, 876 F.2d 30, 33 n.2 (5th Cir. 1989) ("pro se attorney's race discrimination suit"); *Naekel v. FAA*, 845 F.2d 976, 978, 981 (Fed. Cir. 1988) ("pro se attorney fees"); *United States v. Espinosa*, 771 F.2d 1382, 1399 (10th Cir. 1985) ("pro se attorney defendant"), *cert. denied*, 474 U.S. 1023 (1985).



Plainly, the common usage of "attorney" as a synonym for "lawyer" should be preferred over the historical usage that refers to an agency relationship. Even the Solicitor General concedes (U.S. Br. 12) that statutory terms should be given their "ordinary meaning." *See Moskal v. United States*, No. 89-964 (Dec. 3, 1990). Since petitioner unquestionably falls within the ordinary meaning of the term "attorney" (Pet. App. 3a), and since respondents and amici do not seriously claim that he fails to satisfy any of the other requirements of section 1988, he is entitled to a fee award.[2]

## II. THE HISTORY AND PURPOSES OF SECTION 1988 SUPPORT THE AWARD OF FEES TO PRO SE ATTORNEYS

Petitioner's opening brief (Pet. Br. 12-18) explained that section 1988 was passed by Congress in the wake of this Court's decision in *Alyeska Pipeline Serv. Corp. v. Wilderness Soc'y*, 421 U.S. 240 (1975), to remedy "an anomalous gap" in, and encourage vigorous enforcement of, the civil rights laws. S. Rep. No. 1011, 94th Cong., 2d Sess. 1 (1976) ("Senate Report"); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976) ("House Report"). In particular, Congress intended to make fees available

[2] *See Jones v. Lujan*, 883 F.2d 1031, 1035 (D.C. Cir. 1989) (noting that it "strain[s] conventional language to infer any ambiguity regarding the scope of the meaning of 'attorney fees' simply because the statute does not state 'fees of an attorney or lawyer'").

Respondents, joined by the Solicitor General (Resp. Br. 12-13; U.S. Br. 16-20), also focus attention on the words "fees" and "costs," arguing that these terms, too, implicitly exclude a pro se attorney because no fee is paid and no costs are incurred. That argument is foreclosed, however, by this Court's decision in *Blum v. Stenson*, 465 U.S. 886 (1984), which held that a section 1988 fee award is available regardless of whether the particular attorney is paid a "fee" or the prevailing party incurs any actual "costs" for legal services. Respondents themselves concede that "the actual paying relationship between an attorney and his client is irrelevant" (Resp. Br. 15).

to organizational litigants who represented themselves in civil rights litigation—litigants indistinguishable from pro se attorneys. The language of section 1988, which explicitly excludes the United States from eligibility for fees, confirms Congress' intent. Had Congress wanted to exclude all organizations represented by their own attorneys, the explicit reference to the United States would have been unnecessary.

Respondents and their amici concede (Resp. Br. 18-19; U.S. Br. 24-25) that Congress intended organizational litigants to receive section 1988 fee awards; they could hardly do otherwise given the clear indication of congressional intent (*see* Pet. Br. 14-15). Instead, they devote the bulk of their effort to asserting that pro se attorneys should be treated like pro se non-attorneys rather than organizational litigants, and to arguing that Congress' sole rationale for section 1988 was to compensate clients who employ lawyers for a fee. Neither effort is successful.

*First*, respondents and amici maintain (Resp. Br. 14, 21-22; U.S. Br. 25-28) that attorneys should be treated, for purposes of section 1988, the same as non-attorneys, arguing that there is no rational distinction between the two categories of pro se litigants. Respondents go so far as to suggest that "the only thing that differentiates an attorney from a non-attorney when it comes to conducting legal matters is the attorney's authorization to represent another person" (Resp. Br. 14). This assessment defies common sense: it overlooks the specialized training attorneys receive and hence the greater contribution they make to the illumination and resolution of cases. It also ignores the higher obligations that lawyers undertake, including the highly developed set of ethical obligations that constrain and control attorneys' behavior, *see, e.g.*, ABA Model Rules of Professional Conduct, Rule 3.3 (Candor Toward the Tribunal), and the more ready



ability to impose sanctions on attorneys, including the potential loss of a valuable, state-conferred license.[3]

Thus, as petitioner has shown (Pet. Br. 15-17), pro se attorneys are more appropriately compared to organizational litigants—a category of litigants clearly eligible for a section 1988 fee award. As petitioner explained (Pet. Br. 15-18), a pro se attorney is indistinguishable from a pro se organizational litigant: both simultaneously appear as the party and provide the legal representation.

Respondents and their amici (Resp. Br. 20 & n.10; U.S. Br. 17-19, 25) dismiss the comparison between organizations and pro se attorneys by once again relying on the term "attorney" as involving a form of agency. Indeed, for respondents, this elevation of form over substance is sufficient; they fail even to address petitioner's assertion (Pet. Br. 17) that distinguishing pro se attorneys from organizational litigants on such a basis would involve the courts in a case-by-case assessment of the attorney-client relationship, lead to inappropriate line-drawing, and invite evasion.

The Solicitor General, in contrast, concedes that his suggested organization-pro se attorney distinction breaks down, and urges that, in some circumstances, his theory would require that an organization be treated as if it

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[3] *Compare Jones v. Smith*, 99 F.R.D. 4, 8-9 (M.D. Pa. 1983) (sanctioning pro se attorney plaintiff, noting that it "consider[s] Plaintiff's conduct all the more egregious due to the fact that Plaintiff is an attorney"), *aff'd*, 734 F.2d 6 (3rd Cir. 1984), *with Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (per curiam) (noting "settled law" that pleadings "not prepared by counsel . . . are held 'to less stringent standards than formal pleadings drafted by lawyers'") (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). *See generally Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 487-491 (1988) (O'Connor, J., dissenting) (reviewing special characteristics of attorneys).

were a pro se attorney. To identify such situations, the Solicitor General proposes a new, unspecified form of case-by-case assessment (U.S. Br. 19):

> Lawyers representing bona fide organizations are eligible for a fee awards, but organizations that are no more than the lawyer's alter ego do not transform a pro se lawyer into an attorney.

Noticeably absent, however, from the Solicitor General's brief is any attempt to delineate more clearly the appropriate standard or even to apply it to the specific examples mentioned in petitioner's opening brief (Pet. Br. 17) and in the amicus curiae brief in support of petitioner filed by Public Citizen (Br. 11-12).[4] Under the Solicitor General's approach, courts would be required to evaluate the precise nature of organizational litigants to determine if they were so closely identified or associated with their attorneys that they should be considered the same for purposes of section 1988. This analysis is akin to piercing the corporate veil—an issue of notorious complexity. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 n.5 (1969).[5]

At bottom, the Solicitor General's approach adds another layer to the already complex task of arriving at an appropriate award under section 1988. Given this Court's previously expressed view that "[a] request for attorney's fees should not result in a second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), there is no basis to accept the Solicitor General's invitation to develop a new test for identifying "alter ego"

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[4] The cases cited by the Solicitor General (U.S. Br. 18) provide no guidance on how the Solicitor General's proposed inquiry would be conducted.

[5] *See also Brunswick Corp. v. Waxman*, 459 F. Supp. 1222, 1229 (E.D.N.Y. 1978) ("The circumstances under which a court should disregard the corporate fiction are not always clear and it is difficult, if not impossible, to formulate a precise and categorical definition applicable to all situations . . . each case being *sui generis*.") (citation omitted), *aff'd*, 599 F.2d 34 (2d Cir. 1979).



organizations. Rather, a bright-line standard allowing reasonable fees for all prevailing parties if the legal services were performed by an attorney furthers Congress' intent.

*Second*, in discussing section 1988's legislative history, respondents and amici misperceive the policies of the statute. They suggest that "Congress' main concern was with citizens who might be unable to assert their civil rights because they could not afford to hire attorneys to represent them in court" (Resp. Br. 17; *see also* U.S. Br. 21-24; Hawaii Br. 6). Focusing on this concern, respondents and amici suggest that application of the statute should be limited to "the traditional attorney-client relationship" (U.S. Br. 21).

The Congress that passed section 1988 undoubtedly was motivated in part by the desire to make civil rights litigation economically viable. But this concern is not limited to traditional attorney-client relationships. In the absence of attorney's fees, a pro se attorney might well have difficulty in employing another attorney to take his case pro bono (reflecting a prevailing attitude that pro bono services should be reserved to those unable to represent themselves). At the same time, if denied attorney's fees, the attorney might have inadequate resources to take time from his own practice to bring a civil rights claim. Thus, the very legislative concern cited by respondents and amici suports petitioner's position.

Moreover, while it is no surprise that the legislative history refers to clients—given that most civil rights litigants undoubtedly are non-lawyers represented by lawyers—it is a mistake to read such references as endorsing only "the traditional attorney-client relationship," involving "payment by a client to an attorney" (U.S. Br. 21). Congress clearly envisioned fee awards in contexts other than the typical attorney-client setting, as reflected in the statutory language (*see* p. 4, *supra*) and

as expressly reflected in the endorsement of fees if "a prevailing party is . . . represented by an organization or if the party is itself an organization." House Report at 8 n.16; *see also* Senate Report at 6. Thus, as this Court has repeatedly recognized, the nature—or even existence—of a paying relationship between an attorney and a prevailing party in a civil rights lawsuit is not relevant to a section 1988 fee award. *See Blanchard v. Bergeron*, 489 U.S. 87, 93-96 (1989) (contingent fee arrangement); *Blum v. Stenson*, 465 U.S. 886 (legal services provided pro bono).

More fundamentally, by looking solely to economic factors and the existence of an attorney-client relationship, respondents and their amici develop a cramped view of the statute, ignoring Congress' repeated emphasis that "[t]he effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens." House Report at 1. The Committee Reports accompanying section 1988 make clear that Congress intended the statute to serve as an incentive to "private attorneys general" to vindicate civil rights, and wanted to involve competent counsel in the effort to uncover and remedy civil rights violations. *See* House Report at 8-9; Senate Report at 3-4. In particular, the Senate Report notes (Senate Report at 3) that "Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of [the] civil rights laws" and that, accordingly, "[m]odern civil rights legislation reflects a heavy reliance on attorneys' fees."

These themes were repeated during Senate debate on section 1988, with Senators noting that "Congress should encourage citizens to go to court in private suits to vindicate its policies and protect their rights," 122 Cong. Rec. 31,471 (1976) (statement of Sen. Scott); that section 1988 "lends substance to the private enforcement of rights" *id.* at 31,472 (statement of Sen. Kennedy); and that "Congress firmly intends that all our civil rights laws be vigorously enforced," *id.*



The legislative history therefore reflects that section 1988 has a broad purpose of "encourag[ing] successful civil rights litigation," and that "Congress implemented its purpose by broadly requiring" defendants to pay a reasonable attorney's fee to prevailing plaintiffs. *Blanchard v. Bergeron*, 489 U.S. at 94-95 (applying these purposes in holding that a contingent-fee agreement did not impose a limitation on the amount of fees recoverable under Section 1988); *see also* House Report at 5; *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (per curiam). These goals are equally served when fees are awarded to pro se attorneys or parties represented by counsel.

## III. THE POLICY ARGUMENTS OFFERED BY RESPONDENTS AND THEIR AMICI FOR DENYING FEE AWARDS TO PRO SE ATTORNEYS ARE UNAVAILING

Perhaps recognizing that their other points are unconvincing, respondents and their amici offer a host of policy arguments that find no support in the language or history of the statute to justify denying fees to pro se attorneys. This unfocused list of objections presents nothing to override the statute's language, history, and underlying purposes.

*First*, respondents and their amici (Resp. Br. 21-22; U.S. Br. 26-27; Hawaii Br. 9-10) express concern with the conflicting motivations a pro se attorney may face, arguing, for example, that the attorney's interest in a fee award "may cause him to pursue marginal litigation" (U.S. Br. 27). Similarly, they worry (Resp. Br. 21; U.S. Br. 26) that pro se attorneys will lack the necessary "objectivity and detachment" and will, therefore, provide poor representation for civil rights plaintiffs. As discussed in petitioner's opening brief (Pet. Br. 16), the same concerns could be expressed with respect to organizations. But, in any event, the remedy is simple, and it is already provided in the statute. Section 1988 pro-

vides fees only for prevailing parties, thus ensuring that pro se attorneys will have no incentive to pursue fruitless litigation. To the contrary, in authorizing fees for prevailing defendants subjected to groundless civil rights lawsuits (House Report at 7), section 1988 gives pro se attorneys a *dis*incentive to pursue meritless litigation.[6]

It is also unpersuasive for respondents and their amici to profess such concern for the quality of advocacy by pro se attorneys. Neither respondents nor their amici cite any specific evidence to support the assertions that pro se attorneys will bring meritless litigation; the Solicitor General, for example, merely claims (U.S. Br. 26) that "[e]xperience has shown" pro se attorneys have such tendencies. The real concern of respondents and their amici is not that pro se attorneys will be ineffective, but rather that pro se attorneys will, as petitioner has, effectively enforce the civil rights laws and prevail in civil rights litigation. Hawaii's Attorney General and the Attorneys General of the twenty other states joining Hawaii's brief have found pro se attorneys so successful in identifying and litigating civil rights violations that they express concern (Hawaii Br. 2) that allowing fees for pro se attorneys will impose "potentially devastating costs" on their respective state treasuries. *Cf. Jones v. Lujan*, 883 F.2d at 1036 n.6 ("'[T]he pro se attorney's skills as an advocate will in all probability . . . serve to increase the level of competency by which claims are processed.'") (quoting factual finding by district court).

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[6] *See generally Jones v. Lujan*, 883 F.2d at 1036 ("Ethical and disciplinary considerations, concerns about incentives and the objectivity of pro se attorneys, and other practical matters will all be taken care of with the confines of [section 1988's] strictures, and pursuant to normal rules of conduct for counsel.") (footnote omitted); *Duncan v. Poythress*, 777 F.2d 1508, 1514 (11th Cir. 1985) (en banc) (noting that "a lawyer who brings a frivolous suit may be liable for defendants' attorney's fees under the standard set out by the Supreme Court in *Christiansberg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)"), *cert. denied*, 475 U.S. 1129 (1986).



In light of Congress' expresed intent to encourage civil rights lawsuits (pp. 8-9, *supra*), a concern that pro se attorneys will effectively enforce the civil rights laws obviously is not a basis to preclude pro se attorneys from receiving fee awards.

*Second*, amici profess (U.S. Br. 26-27; Hawaii Br. 10) great concern with the ethical quandaries that may face pro se attorneys. Specifically, both the Solicitor General and Hawaii's Attorney General point to EC 5-9 of the ABA's Model Code of Professional Responsibility, which indicates that the roles of an advocate and a witness generally are inconsistent. This conflict is more imagined than real. As the Solicitor General concedes, "there is authority that testimony by a pro se lawyer does not violate the rules of professional ethics" (U.S. Br. 26), and in many cases, as was true here, the attorney will not appear as a witness. In any event, it seems singularly inappropriate to deny attorneys' fees to lawyers proceeding pro se as a means of discouraging pro se appearances and thereby avoiding possible ethical problems. If there is any problem in this area it can and should be resolved by application of appropriate ethical rules, not by creating a blanket discouragement to pro se appearances by attorneys in a statute that does not even remotely address this ethical question.

*Third*, Hawaii's Attorney General (Hawaii Br. 6-8) suggests that awarding fees would "yield windfalls" for pro se attorneys, since many pro se attorneys would end up recovering greater hourly fees in their own cases than in cases on behalf of clients. This argument misunderstands established attorneys fees doctrine. Section 1988's legislative history expressly indicates (House Report at 8) that courts should calculate the amount of a fee award in accordance with the factors set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). *See also Blanchard v. Bergeron*, 489 U.S. at 91; *Hensley v. Eckerhart*, 461 U.S. at 429-30 n.3. These factors include "[t]he preclu-

sion of other employment," the typical rates charged by the applicant, and "[t]he experience, reputation, and ability of the attorneys." *See Johnson*, 488 F.2d at 718. Thus, far from producing a windfall, a section 1988 fee award would be adjusted in accordance with the particular characteristics of the pro se attorney involved. The only possible windfall involved here is the windfall that civil rights defendants will receive by escaping liability for a fee award because the plaintiffs uncovering the defendants' civil rights violations happen to be pro se attorneys.

*Fourth*, in an apparent effort to avoid resolution of the central question on which this Court granted certiorari, amici argue (U.S. Br. 13 n.6; Hawaii Br. 2-3) that petitioner in this particular case must be treated as a non-lawyer since he was not admitted to the bar of the United States District Court for the Eastern District of Kentucky, the court in which his constitutional challenge to Kentucky's elections laws was filed. This argument is meritless. Congress did not condition the award of attorneys' fees upon a particular form of compliance with local rules. Here petitioner was specifically authorized to appear because pro hac vice admission is unnecessary for pro se litigants. *See* E.D. Ky. Local R. 3(c). It is also quite clear that he could have been admitted pro hac vice in any event. Petitioner is a licensed attorney, in good standing, of the bar of the State of Florida and is admitted to the bars of the Sixth Circuit and this Court. In any event, as the Solicitor General concedes (U.S. Br. 13 n.6), respondents never made this argument below or in their brief in opposition to certiorari, and it was not a basis for either the District Court's or the Sixth Circuit's ruling. Accordingly, respondents have waived the point, and it is an inappropriate basis on which to decide this case. *See* Sup. Ct. R. 15.1.

*Finally*, the Solicitor General (U.S. Br. 27-28) raises a concern with the "seemliness" of treating pro se attorneys differently from other pro se litigants. This argument is groundless. Congress itself drew precisely this line by authorizing only "attorney's" fees, and that line was fully justified in view of the important distinction between non-lawyers and lawyers: only the latter have specialized legal training. Virtually every court that has awarded fees to pro se lawyers has made it clear that pro se non-lawyers are ineligible for fees. *See, e.g., Duncan v. Poythress*, 777 F.2d 1508, 1510 & n.6 (11th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1129 (1986); *Rybicki v. State Bd. of Elections*, 584 F. Supp. 849, 859 (N.D. Ill. 1984) (three judge court). If it were indeed unseemly to make such a distinction, the logical solution is not to prohibit pro se lawyers from recovering fees, but to urge Congress to authorize fees for non-lawyers as well, a result supported by several commentators. *See, e.g.*, Note, *Awarding Attorney's Fees to Prevailing Pro Se Litigants*, 80 Mich. L. Rev. 1111 (1982); Note, *Attorney Fees, Freedom of Information, and Pro Se Litigants: Per Se Prohibitions Frustrate Policies*, 26 Wm. & Mary L. Rev. 349 (1985).



## CONCLUSION

For the foregoing reasons and those presented in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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